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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CHARLES MILTON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REFUSE TO CONSIDER A FEDERAL CLAIM WHICH WAS NOT RAISED IN THE STATE COURT?

II. WHETHER THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL VIOLATES DUE PROCESS?

III. WHETHER THE REFUSAL OF THE TEXAS COURTS TO DEFINE WORDS OF COMMON AND ORDINARY MEANING VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

IV. WHETHER THE UNOBJECTED TO ARGUMENT OF THE PROSECUTOR CONSTITUTED A COMMENT ON PETITIONER'S FAILURE TO TESTIFY?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, and, by and through its Attorney General, Mark White, files this its Brief in Opposition.

OPINION BELOW

Petitioner's conviction for capital murder was affirmed on June 11, 1980, in Milton v. State, 599 S.W.2d 824 (Tex. Crim.App. 1980). Motion for Rehearing was denied on December 10, 1980.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3). However,

as noted below in reasons for denying the writ, Petitioner has failed to present to the state court all of the issues presented in his petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also involved are Articles 3.01, and 37.071, Vernon's Ann. C. C. P.

STATEMENT OF THE CASE

On July 26, 1977, Petitioner was indicted for the offense of capital murder. Trial began on September 18, 1978, and on October 9, 1978, Petitioner was found guilty by the jury. The jury thereafter found as true the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P., and, accordingly, punishment was assessed at death.

The record reflects that on June 24, 1977, Petitioner, armed with a pistol, robbed Leonard Denton and his wife, who owned and operated a liquor store in Fort Worth, Texas. During the entire robbery, Petitioner held the gun on Mrs. Denton. After robbing the couple, Petitioner, still holding the gun on Mrs. Denton, ordered the two into a back room. Mr. Denton caught the barrel of the gun, in an attempt to prevent Petitioner from shooting Mrs. Denton. Petitioner and Mr. Denton struggled, with Mr. Denton trying to push the gun away from his wife and Petitioner managing to point the gun back at the woman. After Mrs. Denton struck Petitioner, he again pointed the gun at her and shot her. When Mr. Denton begged Petitioner to leave, stating that Petitioner had killed Mrs. Denton, Petitioner responded "Hell no. I haven't kill her yet, but she is going to die." Petitioner also shot and critically wounded Mr. Denton, who, in spite of his injuries, survived and testified at trial. There was evidence that no one but Petitioner could have pulled the trigger, and Mr. Denton vehemently denied that the shooting occurred accidentally.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to consider the issues presented.

This Court should refuse to consider claims not raised in the state courts. Petitioner has never previously argued that the imposition of the death penalty in his case is disproportionate and constitutes cruel and unusual punishment under the Eighth Amendment. Rather, he only challenged the sufficiency of the evidence under state law. While this Court has consistently declined to review issues not raised or decided in the court below, the state court record reflects that the penalty of death in the instant case is not disproportionate, given the nature and severity of Petitioner's conduct.

The admission of extraneous offenses at the punishment phase of a capital murder trial is constitutionally permissible. This Court found constitutional the Texas death penalty statute because it allowed the jury's consideration of all relevant evidence about the individual defendant, in determining punishment. Whether Petitioner had actual notice of the state's intent to introduce evidence of Petitioner's prior criminal acts presents only a question of fact. The record reflects that Petitioner did have notice.

The refusal of Texas courts to define words of common and ordinary meaning in the capital murder statute does not violate constitutional principles. This Court has previously held that this statutory scheme is sufficient to constitutionally guide the jury's discretion and determination of the punishment issues.

The argument of the prosecutor, when viewed in the context in which it was made, is clearly not a comment on Petitioner's failure to testify. Obviously Petitioner's trial counsel did not believe the argument contained a constitutionally impermissible reference, because the record fails to reflect that he ever voiced any such objection.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced no special or important reasons in this case and none exist.

II.

THIS COURT SHOULD REFUSE TO CONSIDER A CLAIM NOT RAISED IN THE STATE COURT

Petitioner's claim that his sentence of death constitutes cruel and unusual punishment under the Eighth Amendment because it is disproportionate to the nature of his acts was not raised in his appeal to the Texas Court of Criminal Appeals. See, Respondent's Appendix A. Petitioner claimed in state court only that the evidence was insufficient under state law to support the jury's affirmative findings to the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P. Thus, no state court has had the opportunity to review the federal constitutional issue here raised. This Court has consistently declined to review in the petition for writ of certiorari or appeal, issues which were not raised or decided in the court below. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). Petitioner has an available state court procedure for raising his claim in the state courts. See, Article 11.07, Vernon's Ann. C. C. P. Respondent submits that in view of Petitioner's failure to raise this issue below, the absence of any state court ruling on the issue and the fact that a state remedy is available to Petitioner for presenting his claim to the state court, this Court should decline to review this contention.

However, even had this contention been presented to the state court below, it is frivolous in light of the record. On June 24, 1977, Petitioner, armed with a pistol, entered the L & M Liquor Store in Fort Worth, Texas. (S.F. 1992-1993) [1/] He asked the owners, Leonard Denton and his wife of thirty eight (38) years for an item in the store. (S.F. 1999) As Mr. Denton went to get the item, Petitioner turned fast and pulled a .38 caliber revolver. (S.F. 2001) He ordered both Mr. and Mrs. Denton to "hit the floor." (S.F. 2002) Petitioner then demanded that Mrs. Denton get up and put all of the money from the cash register in a bag. (S.F. 2004-2005) Mrs. Denton complied and handed the bag to him. Petitioner also demanded and received the billfolds of Mr. and Mrs. Denton. (S.F. 2059) All of this time Petitioner was pointing the gun at Mrs. Denton. (S.F. 2005) He then ordered both victims into a back room, still holding the gun on Mrs. Denton. (S.F. 2008) Mr. Denton caught the barrel of the gun to keep Petitioner from shooting his wife, and shoved it away. (S.F. 2011) Petitioner turned the gun back towards Mrs. Denton. (S.F. 2012) Five to six times Mr. Denton pushed the gun away from his wife and Petitioner shoved it back. (S.F. 2012) Mrs. Denton struck Petitioner with wine bottles, and Petitioner then swung the gun around and shot her. (S.F. 2015-2018) Mr. Denton cried "Why don't you leave? Haven't you done enough. You have killed my wife," to which Petitioner responded, "Hell no. I haven't killed her yet, but she is going to die." (S.F. 2020)

Mr. Denton and Petitioner then struggled for the gun, and, this time, Petitioner shot Mr. Denton. (S.F. 2021) Someone drove up to the store and Petitioner ran away. Mrs. Denton died, but Mr. Denton survived and testified against

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1/ "Tr." will refer to the state court record containing all pleadings and papers filed in this cause. "S.F." will refer to a transcription of the court reporter's notes from the trial.

Petitioner at trial. Mr. Denton vehemently denied that the shooting was accidental. (S.F. 2057, 2058) He also testified that during the entire struggle, he had his hand on the barrel of the gun. (S.F. 2013, 2023, 2072) There was also evidence to show that only Petitioner's finger could have been on the trigger of the gun. (S.F. 2014)

At the punishment phase of the trial, testimony was introduced that a few days before trial, Petitioner had been carrying another gun in his automobile, and that he had borrowed the gun which he used in this robbery-murder. (S.F. 2349-2353, 2224-2232) Additionally, there was testimony that two days before the robbery-murder, Petitioner had robbed at gunpoint the female owner of another business. After taking her money and purse, Petitioner ordered her into the bathroom of the shop and threatened to "blow her head off." (S.F. 2353-2362) Then, just one day before the instant robbery-murder, Petitioner approached the owner of a car lot, stating that he wanted to buy a car. Once inside the office, Petitioner pulled a pistol on the victim and demanded money. Upon learning that there was no money in the office, Petitioner took the victim's watch, billfold and rings. When the victim had difficulty taking one of his rings off of his finger, Petitioner threatened to "blow it off." After unsuccessfully attempting to take more property, Petitioner ordered the victim into a bathroom and told him to stay or he (Petitioner) would "shoot through the door." (S.F. 2365-2374) In addition, there was evidence that Petitioner had a prior felony conviction for theft. (S.F. 2343)

The state trial record reflects that the evidence is sufficient to support the jury's findings on the special issues. The penalty of death was not disproportionate given the nature and severity of Petitioner's conduct in committing this murder.

III.

THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL DOES NOT VIOLATE DUE PROCESS

The admission of evidence relevant to the jury's determination of the issues at the punishment phase of a capital murder trial does not violate due process. The second statutory question submitted to the jury at the punishment phase of a capital murder trial requires the jury to make a prediction of the future criminal conduct of the defendant. Article 37.071(b)(2), Vernon's Ann. C. C. P. This Court approved this statutory death penalty scheme in Jurek v. Texas, 428 U.S. 262 (1976), specifically stating:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced. 428 U.S. at 277.

Evidence relevant to the jury's determination of the defendant's future criminal conduct, including his prior criminal acts, is properly admissible at the punishment phase of a capital trial. Jurek v. Texas, supra.

Whether Petitioner had actual notice that the State, during punishment proceedings, would present evidence that Petitioner had committed two aggravated robberies shortly before the instant robbery-murder, presents only a question of fact. Contrary to the representations in the petition for writ of certiorari, however, the record does reflect that Petitioner had actual notice that the state intended to introduce this evidence. Prior to trial Petitioner obtained a complete list of all witnesses the state intended to call. (Tr. 18). He had access to the prosecutor's entire file on his case, (Tr. 17, S.F. 36), and he filed a pre-trial motion in limine regarding these extraneous offenses (Tr. 43). Petitioner's trial counsel represented him on these two aggravated robbery offenses, as well as the instant robbery-murder, (S.F. 2) and counsel had a joint discovery hearing

on all three cases (S.F. 2). Prior to the state's introduction of evidence of these two robberies, the prosecutor informed Petitioner's counsel, out of the jury's presence, of the evidence he intended to offer. (S.F. 2345-2348). Petitioner's counsel never claimed at trial that he was in any way surprised by the introduction of this evidence. A question of fact, such as presented here, does not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, supra; Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949).

IV.

THE REFUSAL OF TEXAS COURTS TO DEFINE WORDS OF COMMON AND ORDINARY MEANING DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Article 3.01, Vernon's Ann. C. C. P. provides that:

> All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined.

Words of common meaning, such as "deliberately" and phrases such as "criminal acts of violence," are not specifically defined by 37.071, Vernon's Ann. C. C. P. Thus, these words and phrases must be understood in their common and ordinary meaning. The Texas Court of Criminal Appeals has refused to legislatively create definitions for words undefined by the statute. See, Battie v. State, 551 S.W.2d 401 (Tex.Crim. App. 1977); King v. State, 553 S.W.2d 105 (Tex.Crim.App. 1977). As this Court concluded in Jurek v. Texas, supra, this statute, as enacted, is sufficient to constitutionally guide the jury's discretion and determination of the punishment issues.

In jury selection procedures, the Texas Court of Criminal Appeals has held that while great latitude should be allowed the parties in the conduct of the voir dire examination, the trial court has discretion regarding limitations on voir dire examination. Esquivel v. State, 595 S.W.2d 516, 525 (Tex.Crim.App. 1980); King v. State, supra. The same rule

applies in the federal courts. See, Hamling v. United States, 418 U.S. 87, 139 (1974). The record reflects that the voir dire examination in the instant case was full, complete and fair to Petitioner. Petitioner's contention fails to state a substantial federal question.

V.

THE UNOBJECTED TO ARGUMENT OF THE PROSECUTOR DID NOT CONSTITUTE A COMMENT ON PETITIONER'S FAILURE TO TESTIFY

The statement of the prosecutor which Petitioner contends constituted a comment on his failure to testify must be viewed in the context of the jury argument in which it was made. When the argument is viewed in context, it is clear that it was not intended, and would not naturally and necessarily be viewed by a jury as a comment on Petitioner's failure to testify as prohibited in Griffin v. California, 380 U.S. 609 (1975). Further, Petitioner's trial counsel did not take the argument to be a comment on Petitioner's failure to testify, as the record reflects that he made absolutely no objection to the argument now attacked. The prosecutor argued:

> At one point Mr. Carter, during the voir dire examination, said "you, know, this is not a monster movie." And he gave an example about the martians coming down and doing it, reasonable doubt. Boy, he's right. This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder. But, you know, we picked a jury. Twelve people who had the integrity, the backbone to bow their necks and call it like they see it. I think you're that jury.

Viewed in the context of the argument immediately preceeding, it is very clear that the reference to the "person who lived through that nightmare" was a reference to Mr. Denton, who saw his wife murdered, struggled with Petitioner, and was himself critically wounded. (Respondent's Appendix B). The argument concerning the person "still here to tell [the jury] about it" was an obvious reference to Mr.

Denton's testimony concerning the nightmarish events surrounding the robbery-murder. Trial counsel's failure to object in any way to the argument further supports the conclusion that the argument was not intended or taken by anyone to be a comment on Petitioner's failure to testify. United States v. Sorzano, 602 F.2d 1201, 1202 (5th Cir. 1979).

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that Petitioner's petition for certiorari be denied.

Respectfully submitted,

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APPENDIX A

64268

No. _____

In the

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
CRIMINAL DISTRICT COURT No. 213
TARRANT COUNTY, TEXAS

JAN 21 1980

J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

CHARLES MILTON

Appellant,

v.

THE STATE OF TEXAS

Appellee.

On Appeal from the 213th Judicial District
Court of Tarrant County, Texas

BRIEF FOR APPELLANT

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210 W. 6th Street
Fort Worth, Texas 76102

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January 21, 1980

FILED IN
COURT OF CRIMINAL APPEALS
MAR 25 1980
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APPELLANT'S GROUNDS OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDINGS UNDER ART.37.071, TEX.CODE CRIM.PROC.ANN. (1973).

II. THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHEN THE PROSECUTOR IMPROPERLY COMMENTED ON HIS FAILURE TO TESTIFY.

III. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 38.

IV. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 3.

V. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL THE RIGHT TO A FULL VOIR DIRE EXAMINATION OF THE JURY PANEL IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.

VI. THE USE OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

STATEMENT OF FACTS

On the afternoon of June 24, 1977, Leonard and Menaree Denton were working in the L&M Liquor Store, a business which they owned, (R.1950). At approximately two o'clock a black male entered the store, pulled a gun and pointed it at Mrs. Denton, (R.2002). The gunman ordered Mrs. Denton to give him some money, (R.2004).

After Mrs. Denton handed over a bag of money, the robber told the Dentons to walk to a back room, (R.2010). As they walked toward the room, Mr. Denton grabbed the robber's pistol and began scuffling with him, (R.2013). Mrs. Denton managed to hit the assailant over the head with two wine bottles, but the fight continued. Suddenly, the gun fired and Mrs. Denton fell to the floor, (R.2017).

Mr. Denton yelled, "Why don't you leave? Haven't you done enough. You've killed my wife." According to Mr. Denton, the gunman replied, "Hell no, I haven't killed her yet but she is going to die," (R.2020). The struggle between the two men continued and Mr. Denton was also shot. Despite his wound, however, Mr. Denton managed to twist the pistol out of his assailant's hand, and the fight ended, (R.2024).

When ambulance attendants arrived at the scene, Mrs. Denton was not breathing, (R.1943). She had been shot one time, (R.2236-2244).

Fort Worth police officers, having recovered the weapon at the scene, requested the Bureau of Alcohol, Tobacco and Firearms

to trace the serial number. Ownership of the pistol was traced to an Alfred Gray who told police that he had loaned the pistol to the Appellant, (R.2203-2233).

At trial, Leonard Denton identified the Appellant as being the man who had robbed him, (R.1993). He stated that during the scuffle the Appellant kept pushing the gun so that it would point at Mrs. Denton, (R.2013). On cross-examination, however, he admitted that the gun went off while the two men were fighting and he could not tell the jury that the gun had not fired by accident, (R.2058).

Upon finding the Appellant guilty of capital murder, the jury answered affirmatively the questions posed by art.37.071, TEX.CODE CRIM.PROC.ANN.(1973). The punishment was then automatically assessed as death by injection.

SUMMARY OF ARGUMENT

Charles Milton may deserve life in a penitentiary but he does not deserve, and the evidence in this case does not support, a verdict of death. No human being should die on these facts.

ARGUMENT AND AUTHORITIES

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDINGS UNDER ART.37.071, TEX.CODE CRIM.PROC.ANN. (1973).

This case is a classic example of the injustice which may result from over-zealous and abusive prosecutions under the Texas capital murder statutes. Charles Milton is guilty of aggravated robbery and maybe murder under the felony-murder doctrine. He was guilty of theft of property valued over fifty dollars in 1972. He is obviously guilty of poor judgment and even stupidity. He is not a proper target for death, however, because the death of Menaree Denton was not caused deliberately and there is no competent evidence on which a jury of reasonable people might base a finding that there is "a probability" that this Appellant would constitute a continuing threat to society.

Under TEX.CODE CRIM.PROC.ANN.art.37.071(a) and (b)(1973) the jury in this case was required to find, beyond a reasonable doubt, that (1) the conduct of the Appellant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result; and (2) that there is a probability that the Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

During the punishment phase of the trial, the State introduced evidence that the Appellant was convicted of felony theft in 1972, (R.2337-2345). There was no evidence of any prior

conviction for a crime of violence.

Instead, the prosecution called two witnesses to the stand who testified that the Appellant had also robbed them within a two-day period in June, 1977.

William Hill, a friend of the Appellant, was called to testify that he had seen the Appellant have an automobile accident on June 10, 1977, (R.2350). He saw a pistol under the seat of the Appellant's car and removed it from the scene so that Appellant would not face more trouble when police arrived, (R.2352).

Bonnie Crabb, a beauty operator, told jurors that at approximately 7:00 p.m. on June 22, 1977, the Appellant entered her shop, pulled a gun, and demanded money from the cash drawer, (R.2360). The Appellant then ordered Ms. Crabb into her bathroom and told her to wait fifteen or twenty minutes before calling police, (R.2361). He then fled the scene without doing harm to anyone.

Stacey Meeks, a car dealer, testified that on June 23, 1977, the Appellant pulled a gun, demanded money and took Meek's rings, watch, billfold, and a diamond wedding ring. Meeks was then ordered into a back room and told to wait ten minutes, (R.2365-2377). He was not injured in any way.

The propriety of using unadjudicated extraneous offenses as "evidence" relevant to the 37.071 questions is discussed elsewhere in thie brief. However, even if this Court persists in upholding the prosecution's authority to use such evidence, these facts support the conclusion that Appellant did not deliberately cause the death of the decedent in this case.

Having a wreck is not an act of violence. The robbery modus operandi which is evident from a reading of this transcript encompasses a time span of only three days -- June 22, 23, and 24, 1977. On each of the occasions prior to Mrs. Denton's death, the Appellant ordered his robbery victims to a back room -- not for the purpose of doing them physical harm -- but to insure his escape.

When he robbed Mr. and Mrs. Denton he followed the same pattern he had used on the preceding two days. He ordered them to a back room. The Appellant could not have known that Mr. Denton would engage him in a physical battle for the pistol.

It has been held that "deliberation" and "premeditation" are the same character of mental operation differing only in degree. As stated in BLACK'S LAW DICTIONARY (rev.4th ed.1968):

> "...deliberation is premeditation in a cool state of the blood...(it) is not only to think beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon...State v. Hall, 55 P.2d 740, 742(N. M. 1936); People v. Thomas, 156 P.2d 7,17(Cal.1945); State v. Payne, 197 S.E.573(N.C.1938); State v. Roedl, 155 P.2d 741, 749(Utah 1945); State v. Cade, 34 S.W.2d 82,83(Mo. 1930)."

There is no evidence that the death of Menaree Denton was the result of any deliberation under any definition. On the contrary, the chain of events which caused her death did not begin when the Appellant entered the L&M Liquor Store, but when Mr. Denton began the struggle over the pistol. To

say that the Appellant acted "deliberately" is to ignore the commonly understood meaning of the word.

In Warren v. State, 562 S.W.474(Tex.Crim.App.1978) this Court reviewed another capital murder conviction. Warren, like the Appellant, had one prior conviction for felony theft. He entered a house for the purpose of committing a burglary. While there, the owner of the house walked in and started yelling. Warren pulled a gun and shot the victim in the head. The jury had before it only the evidence of Warren's prior theft conviction and the facts of the case itself. There was no qualified psychiatric testimony which would have had a probative value as to special issue number two under Article 37.071.

In reversing Warren's conviction, this Court held that although the murder committed by Warren was a criminal act of violence, it was not a "calculated act". There was, therefore, no evidence of past violence, no evidence that violence was initially intended and no evidentiary predictions of future violence.

The same conclusion applies to the facts in the case at bar. What evidence is there to support a prediction of future violence? On three days in June, 1977 this Appellant committed three robberies. He had no history of violence. His modus operandi, as developed by the State's own evidence, was to leave his victims in a safe place for only as long as he needed to make his escape. There was no evidence that the Appellant had a degenerate or violent personal history or

that he lacked respect for human life. This record does not even reflect who pulled the trigger.

Appellant is aware that this Court has often found evidence sufficient to sustain convictions for capital murder, Granviel v. State, 552 S.W.2d 107(Tex.Crim.App.1976); Smith v. State, 540 S.W.2d 693(Tex.Crim.App.1973); Livingston v.State, 542 S.W.2d 655(Tex.Crim.App.1976); Moore v. State, 542 S.W. 2d 664(Tex.Crim.App.1976); Felder v. State, 564 S.W.2d 776 (Tex.Crim.App.1978); Duffy v. State, 567 S.W.2d 197(Tex.Crim. App.1978); Bodde v. State, 568 S.W.2d 344(Tex.Crim.App.1978): Hammett v. State, 578 S.W.2d 699(Tex.Crim.App.1979); etc. However, in all of the cases cited above, there was either expert testimony or evidence which tended to make the offenses particularly brutal. Indeed, the circumstances of a given crime may itself be severe enough to sustain affirmative answers to the 37.071 questions, Muniz v. State, 573 S.W.2d 792(Tex.Crim.App.1978).

This case also differs from those in which the 37.071 evidence has been found to be sufficient to sustain a death verdict in that this Appellant's acts were simply unlike the acts of those who are now awaiting execution. Even if this Court should find that there is enough evidence to support the jury's resolution of the probability issue, a most cursory reading of this record would show that this Appellant did not "deliberately" shoot anyone, if he shot them at all.

APPENDIX B

to bolster our witness. And, we're not allowed to do that and he knows he has a right to cross examine a witness if he wants to.

THE COURT: Overrule the objection.

MR. HANNA: This business about the struggle over the gun, they would have you to believe that Mr. Milton's hand is withered. He couldn't use that. He uses his left hand. Put me in this picture right here. Mr. Milton and Mr. Denton are fighting over the gun. The gun's in the left hand. Mrs. Denton is over here. Mr. Milton has the gun in his left hand right here coming to his power. Everyone knows you are stronger pulling into your body right down here. Mr. Denton, they tell you he's right handed. He's got the gun like this and he's trying to get it up here. He was pushing away from his body. He's not as strong. And, again, that may be a minor point. I don't think--surely you wouldn't be sidetracked by something like that. This is not television. This is not Perry Mason where all of a sudden the right hand and the left hand really becomes an issue.

Remember those crime scene pictures. What was going on inside of there. People falling over wine racks. Shots being fired.

D. L. Calvin
Certified Shorthand Reporter

Another point. Holding this gun over your head., as Mr. Williams did and say: "Well, the only way it could have been fired is when it's up over your head." Up over your head, pointed down? Two people fighting over a gun up over your head pointed down? Like this? Of course not. It's up over your head pointed up. If it had been pointed up Manaree Denton would still be alive. It doesn't make sense. Television stuff. This is the real world. I don't think I need to tell you this. People are living and are being shot and dying in their stores right here.

They tell you that what a man says after he shoots somebody has no bearing on what his intent is. Well, that's horse feathers. That's not right. Not only does he make a statement: Pulls the trigger two times after that. This tells you something.

Another point is made by Dr. Grotts, what he wouldn't testify to and what he would. Dr. Grotts wasn't there. If he was there he would have told you what happened. Dr. Grotts is not going to testify as to what position she was in when she was shot. Use your common sense. She was bending over. The projectory of the bullet, there ain't a way in the world that gun was pointed

down like that. That's the silliest thing I've ever heard. If it had been over the head it would have been pointed straight up.

Why didn't the gun go off earlier? It just so happens, just a sheer coincidence, just so happens Mrs. Denton is shot after she has struck him on the head twice with two wine bottles. Broke them. Made him mad. He's over there fighting with the husband. And, all of a sudden you got somebody jumping into the fight. It's not a fair fight — He's mad. He gets cracked over the head with two wine bottles. What does she do? She walks back over toward the cash register. And, like Mr. Williams says everybody knows a gun in a retail store is kept by the cash register. Why would he want to kill her is what Mr. Williams asks you. Very obvious to you, I think. She has hit him on the head twice with two wine bottles. Didn't do any good. And her husband is there struggling with him. What does she do? What would any person do? She knows that gun is there. Where is she shot? (gesturing) Right by the gun. And, ask you why would he want to... Don't you know that Charles Milton had his eye on her as she was walking toward that gun? Don't you know that he was worried?

Don't you know he thought about the fact that a gun is customarily kept by a cash register in a store? Why would he want to kill her? Very obvious.

Mr. Denton, an advocate? An advocate? A witness? Yes. An advocate, no. A victim? Yes. Truthful man? Yes. Like I say, try anybody, try everybody, try anybody; but don't try my client. Try Denton, try Lobingier. Try anybody, but don't try him. Don't think about him. Get the spotlight off of him. It's the oldest trick in the book.

At one point Mr. Carter, during the voir dire examination, said: "You know, this is not a monster movie." And, he gave an example about the martians coming down and doing it; reasonable doubt. Boy, he's right. This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder. But, you know, we picked a jury. Twelve people who had the integrity, the backbone to bow their necks and call it like they see it. I think you're that jury.

First thing I want you to do if you don't remember another thing I've said in this trial, if you forget everything, when you get in that